Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur (via his secretary Dato' Ahmad Tajudin bin Sulaiman)

HIGH COURT (KUANTAN) — CIVIL SUIT NO 22–28 OF 2003
VT SINGHAM J
1 DECEMBER 2009

Civil Procedure — Res judicata — Abuse of process of court — Issues raised and reliefs sought same as earlier action — Whether there was privity of interest between defendants in both suits to invoke doctrine of res judicata — Whether suit abuse of process of the court

Civil Procedure — Striking out — Abuse of process of court — Issues raised and reliefs sought same as earlier action — Whether amounted to multiplicity of actions — Whether suit vexatious, frivolous, scandalous and abuse of process of the court — Whether ought to be struck out

By a summons in chambers (encl 103), the defendant had applied that the plaintiff's writ of summons and the statement of claim be struck out and/or be set aside on the grounds, inter alia; (i) the claim was scandalous, frivolous and vexatious; (ii) the claim was prejudicial, or delay the fair trial of the action (iii) an abuse of the court process; and (iv) the claim was baseless and was founded on the facts and issues that had already been adjudicated upon by the Kuantan High Court ('the first civil suit'). The plaintiff had filed a summons in chambers dated 6 November 2003 (encl 62) to consolidate the present suit with the first civil suit. However, the plaintiff had subsequently applied to withdraw the application.

Held, allowing the defendant's application and striking out the plaintiff's writ of summons with costs:

(1) Although not all affidavit require an affidavit in opposition, on the set of the facts in the instance case an affidavit in opposition was required of the plaintiff. However, as there was no affidavit in reply filed by the plaintiff, the plaintiff was deemed to have admitted the facts and the exhibits therein (see para 4).

(2) Although the cause of action in the present suit is for breach of contract of the said agreement and the cause of action in the first civil suit was for negligence, the fact remained and admittedly, the relief claimed was the same and in respect of the same subject matter and consequent to

the same agreement. This fact was further supported by the plaintiff's own admission in the affidavit evidence filed in support of encl 62. Further, the witnesses who had been called in the first civil suit and the present suit and the document produced were the same. Therefore, it would be most unjust to permit the plaintiff to make a double claim arising out of the same transaction and this would amount to abusing the process of the court, frivolous and scandalous as the claim of relief is wholly unnecessary (see paras 11 & 16).

(3) The fact that the defendant in this civil suit was not the same defendant as in the first civil suit did not disentitle the defendant in this civil suit to apply to invoke the doctrine of issue estoppel as the defendant in both civil suits need not necessarily be the same and each case was decided in its own set of facts and circumstances. In any event there was a privity of interest between the defendants in both civil suits filed by the plaintiff to successfully invoke the doctrine of res judicata (see para 19).

(4) In the circumstances and having considered the established principles in striking out application of the pleadings or the claim of the plaintiff, the courts was of the considered view that this was an appropriate case for invoking the powers of the court to strike out the plaintiff's claim (see para 24); *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 followed.

[Bahasa Malaysia summary

Defendan, melalui saman dalam kamar (lampiran 103), telah memohon untuk writ saman dan pernyataan tuntutan plaintif dibatalkan dan/atau diketepikan atas alasan, antara lain; (i) tuntutan tersebut adalah bersifat skandal, remeh dan menyusahkan; (ii) tuntutan tersebut adalah menjejaskan, atau melengahkan perbicaraan adil tindakan tersebut; (iii) penyalahgunaan proses mahkamah; dan (iv) tuntutan tersebut tidak berasas dan disandarkan atas fakta dan isu yang telah dibicarakan oleh Mahkamah Tinggi Kuantan ('tindakan sivil pertama'). Plaintif telah memfailkan saman dalam kamar bertarikh 6 November 2003 (lampiran 62) untuk menggabungkan tindakan ini dengan tindakan sivil yang pertama. Walau bagaimanapun, plaintif kemudiannya memohon untuk menarik balik permohonan tersebut.

Diputuskan, membenarkan permohonan defendan dan membatalkan writ saman plaintif dengan kos:

(1) Walaupun bukan kesemua afidavit memerlukan afidavit menentang, atas fakta kes ini plaintif dikehendaki memfailkan afidavit menentang. Walau bagaimanapun, memandangkan tiada afidavit jawapan, plaintif dianggap telah mengakui fakta dan ekshibit yang terkandung di dalamnya (lihat perenggan 4).

(2) Walaupun kausa tindakan di dalam tindakan ini adalah untuk kemungkiran kontrak perjanjian tersebut dan kausa tindakan di dalam tindakan sivil pertama adalah untuk kecuaian, fakta adalah kekal dan telah diperakui, relief yang dituntut adalah yang sama dan berkaitan perkara yang sama dan berikutan perjanjian yang sama. Fakta ini selanjutnya disokong oleh pengakuan plaintif sendiri dalam keterangan afidavit yang difailkan untuk menyokong lampiran 62. Selanjutnya, saksi-saksi yang dipanggil di dalam tindakan sivil pertama dan tindakan ini dan dokumen yang dikemukakan adalah yang sama. Oleh itu, ia akan menjadi tidak adil untuk membenarkan plaintif membuat tuntutan berganda yang berbangkit daripada transaksi yang sama dan ini akan mengakibatkan penyalahgunaan proses mahkamah, remeh dan menyusahkan memandangkan tuntutan relief tersebut sesungguhnya tidak perlu (lihat perenggan 11 & 16).

(3) Fakta bahawa defendan di dalam tindakan sivil ini bukan defendan yang sama seperti di dalam tindakan sivil pertama tidak menjejaskan hak defendan dalam tindakan sivil ini untuk memohon untuk membangkitkan doktrin isu estoppel kerana defendan di dalam kedua-dua tindakan sivil tidak semestinya defendan yang sama dan setiap kes diputuskan mengikut fakta dan keadaan kes tersebut. Walau bagaimanapun, terdapat priviti kepentingan di antara defendan-defendan di dalam kedua-dua tindakan sivil yang difailkan oleh plaintif untuk berjaya membangkitkan doktrin res judicata (lihat perenggan 19).

(4) Dalam keadaan ini dan setelah mempertimbangkan prinsip-prinsip yang ditetapkan di dalam membatalkan permohonan pliding tersebut atau tuntutan plaintif tersebut, mahkamah berpendapat bahawa kes ini adalah kes yang wajar untuk menggunakan kuasa-kuasa mahkamah untuk membatalkan tuntutan plaintif (lihat perenggan 24); *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 diikut.]

Notes

For cases on abuse of process of court, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5983–5985.

For cases on striking out in general, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6653–6808.

Cases referred to

Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck and another [2006] SGHC 124 [2006] 3 SLR 712, HC (refd)

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382, SC (folld)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (folld)
Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)
Boey Oi Leng (trading as Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd [2001] MLJU 566, HC (folld)
C (a minor) v Hacknery London Borough Council [1996] 1 FLR 427; [1996] 1 All ER 973; [1996] 1 WLR 789, CA (folld)
Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2) [1967] 1 AC 853, HL (folld)
CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 MLJ 347; [1985] 1 CLJ 235; [1985] CLJ (Rep) 45, FC (folld)
Chan Tuck Seng v Chan Lee @ Chan Kong Chai & Ors [2004] 3 MLJ 62, HC (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)
Dinomoni v Brojo Mohini 29 C 187; 29 IA 24, HC (refd)
Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals [2003] 4 MLJ 654, CA (refd)
Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors [1998] 1 SLR 374, CA (folld)
Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54, Ch D (folld)
Goh Koon Suan v Heng Gek Kiau & Ors [1991] 2 MLJ 307, HC (folld)
Goodson v Grierson [1908] 1 KB 761, CA (folld)
Green v Weatherill [1929] 2 Ch 213, Ch D (folld)
Greenhalgh v Mallard [1947] 2 All ER 255, CA (folld)
Gregson v Erangelon [2003] EWHK 332 (folld)
Hebei Import & Export Corp v Polytek Engineering Co Ltd (No 2) [1998] 1 HKC 192, CA (folld)
Henderson v Henderson [1843–60] All ER Rep 378, SC (folld)
Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors [1990] 3 MLJ 231; [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218, HC (refd)
Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor [1994] 4 CLJ 141, HC (refd)
Kwa Ban Cheong v Kuah Boon Seck & Ors [2003] SGHC 132 [2003] 3 SLR 644, HC (folld)
Lam Chun Lin v Lee Wai Chao & Ors [1998] 2 HKC 68 (folld)
Lee Nyan Choi v Voon Noon [1979] 2 MLJ 28; [1978] 1 LNS 94, FC (folld)
Leong Yew Chin v Hock Hua Bank Bhd [2008] 3 MLJ 340, HC (refd)
May, Re [1885] 28 Ch D 516, CA (refd)
Maxwell v Keun & Ors; Same v Same [1928] 1 KB 645, CA (folld)
Montgomery v Russell [1894] 1 TLR 112, CA (folld)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 AMR 122, CA (folld)

North West Water Ltd v Binnie ua Partners (a firm) [1990] 3 All ER 547, QBD (refd)

Ooi Bee Tat @ Ooi Bee Lee v Ooi Bee Tat & Sons Sdn Bhd & Anor [1999] 5 MLJ 10, HC (refd)

Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)

Packirisamy v Janagi [1970] 2 MLJ 202, HC (folld)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd & Ors [1996] 1 MLJ 309; [1996] 1 CLJ 257, CA (refd)

Punca Klasik Sdn Bhd v Foh Chong & Sons Sdn Bhd & Ors [1996] MLJU 471; [1998] 1 CLJ 601, HC (refd)

Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16; [1993] 3 CLJ 606, SC (refd)

Ram Ranjan Chakerbati v Ram Narain Singh 22 C 533; 22 IA 60, PC (refd)

Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1996] 4 MLJ 233, HC (refd)

Shanghai Hall Ltd v Town House Hotel Ltd [1967] 1 MLJ 223, FC (refd)

Stephenson v Garnett [1898] 1 QB 677, CA (folld)

Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533; [1997] 1 AMR 1, FC (folld)

Teguh Consolidated Sdn Bhd v Talam Corp Bhd (Malayan Banking Bhd, third party) [1996] 5 MLJ 664, HC (refd)

Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors [1993] 1 MLJ 12; [1993] 1 AMR 279, SC (refd)

Tsang Chin Keung v Employees Compensation Assistant Fund Board (No 2) [2003] 1 HKC 499, CA (refd)

Ulser Bank Ltd v Fisher & Fisher [1999] N1 68, Ch D (refd)

UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1989] 3 MLJ 177, HC (refd)

Wong Peng Yan Benjamin v Genting Bhd & Anor [1993] 3 MLJ 713, HC (refd)

Woon Tek Seng & Another v V Jayaraman a/l VA Vellasamy and another [2008] SGHC 38 [2008] 3 SLR 43, HC (refd)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581, PC (folld)

Legislation referred to

Rules of the High Court 1980 O 14A, O 18 r 19, O 92 r 4
Societies Act 1966

Hissham Ramdzan (Hissham & Co) for the plaintiff.
Ong Siew Wan (Toh Seng Seng with him) (Toh & Co) for the defendant.

VT Singham J:

[1] By a summons in chambers (encl 103) ('the said application'), the defendant has, inter alia, applied, in particular, that the writ of summons dated 27 March 2003 (encl 2) with the statement of claim dated 27 March 2003 against the defendant be struck out and/or be set aside. The grounds of the said application are, as in p 2 of the said application, namely:

(a) Bahawa tuntutan plaintif adalah mengaibkan, remeh atau menyusahkan;

(b) Bahawa tuntutan plaintif mungkin menjejaskan, menghalang atau melengahkan perbicaraan tindakan ini dengan adil;

(c) Bahawa tuntutan plaintif adalah suatu penyalahgunaan proses mahkamah;

(d) Bahawa tuntutan plaintif adalah tanpa asas dan berlandaskan fakta-fakta dan isu-isu yang telah diputuskan oleh Mahkamah Tinggi Malaya di Kuantan melalui Guaman No MT(2) 21–9 Tahun 2002;

(e) Bahawa defendan sesungguhnya mempunyai alasan yang kukuh untuk membatalkan tuntutan plaintif;

(f) Atas pengataan-pengataan dan afidavit Rahim bin Abas yang difailkan sebagai sokongan kepada permohonan ini.

[2] The summons in chambers (encl 103) is supported by an affidavit (encl 103A) which is affirmed by Encik Abdul Rahim bin Abas on 4 November 2008 on behalf of the defendant and contains nine exhibits (A–I) which are attached to the affidavit. Regrettably, there is no affidavit in reply from the plaintiff even though there are several facts which in the considered view of this court have been raised by the defendant and which requires a reply or rebuttable evidence from the plaintiff, in particular, paras 6.1(i)–(xii), 6.2(i)(a)–(d) of the afidavit sokongan (encl 103A).

[3] Having gone through and read the summons in chambers (encl 103), the affidavit in support on behalf of the defendant (encl 103A), the affidavit (encl 62A) affirmed on behalf of the plaintiff, the written and oral submissions together with the authorities referred to by both parties and the research carried out by this court, this is the decision of this court.

[4] As there is no affidavit in reply from the plaintiff to the summons in chambers (encl 103) and the affidavit in support (encl 103A) of the defendant, this court finds that the plaintiff is deemed to have admitted the facts and the exhibits attached thereon and that the same are not disputed (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 at p 385; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281;

A [1995] 1 AMR 122 at p 286 (CA); *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 at p 541; [1997] 1 AMR 1 at pp 8–9; *Punca Klasik Sdn Bhd v Foh Chong & Sons Sdn Bhd & Ors* [1996] MLJU 471; [1998] 1 CLJ 601 at p 610). On this ground alone, the defendant ought to succeed in the said application (encl 103), in particular, prayer (b) for the writ
B and the statement of claim to be struck out. Therefore, the writ of summons together with the statement of claim should be struck out as there is no affidavit in reply from the plaintiff and the facts as raised in the affidavit of the defendant requires a reply or an affidavit in opposition. Nevertheless, this court is mindful of the fact that not all affidavit require an affidavit on
C opposition as each case is based on its own set of facts where the opponent is not obliged to reply to the particular set of facts (see *Shanghai Hall Ltd v Town House Hotel Ltd* [1967] 1 MLJ 223 at p 224 which was followed in *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177 at p 178; *Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors*
D [1993] 1 MLJ 12 at p 16; [1993] 1 AMR 279). However, on the set of facts in the instant case, an affidavit in opposition is required of the plaintiff.

[5] Be that as it may, notwithstanding that prayer (b) of the summons in chambers (encl 103) should be allowed on the ground that the plaintiff is
E deemed to have admitted the facts and the contents of the said exhibits are deemed not to be disputed, this court would still proceed to consider the other grounds as raised by the defendant. Before this court proceeds to consider the other grounds as raised in the said application, it is pertinent to consider, in particular, the grounds of judgment dated 10 February 2004 of
F Her Ladyship, Heliliah bt Mohd Yusof J (now FCJ) (exh A) in this Civil Suit No 22–28 of 2003 in an application (encl 49) under O 14A of the RHC 1980 which is relevant in determining the said application, namely, the passages at pp 24, 26, 27 and 28 of the said judgment to determine this application.

G (a) Passage at pp 23–24:

> Exhibit I appended to encl 49 discloses that references are made to an approval (kelulusan) given to the plaintiff by the Director of Forestry of
H Pahang in respect of certain land which are alleged to belong to UMNO. In addition to para 6 of the statement of claim also makes reference to seven licenses. Counsel for the defendant/applicant has contended that there is here a duplicity of action resulting consequently in an abuse of the process of the court.

I

(b) Passage at pp 24–25:

> In the present case, the abuse alleged relates to the repetition of certain claims pertaining to an approval granted in the action that has been filed against the present defendant/applicant. It is also alleged that the defendant/applicant has caused the plaintiff/respondent to suffer very similar or identical liabilities. The statement of claim filed in Civil Suit No 21–9 of 2002 certainly raise issues whether a license or approval has been granted and if so in respect of whose license and who is the owner of the land. These are questions which also relate to s 42 of the National Forestry Act 1984. Although the first action has not been adjudicated the facts in both cases show that the same matter may be relitigated and the court may consider whether the plaintiff is seeking to litigate a matter which is the subject to the discretion of the state authority by filing the suit MT 22–28 of 2003.

(c) Passage at pp 26–27:

> The question of whether there is an abuse of the process of the court would in my view depend on the outcome of the Civil Action No 21–9 of 2002. For the reasons and aforementioned I am unable at this stage to address para 1(d) of the encl 49. While Civil Action No 21–9 of 2002 is founded on facts which may similar to Civil Action No 22–28 of 2003, the basis of the claim against the respective defendants are not identical.

(d) Passage 27:

> I hold the view that it is only until a determination of the issues in Civil Suit No 21–09 of 2002 that it could be established whether the plaintiff has a reasonable cause of action in the second Suit No 22–28 of 2003 or whether it would be established that there is an ulterior motive to a double claim in view of the allegation that there is an 'purported agreement'.

(e) Passage 28:

> Consequently, pursuant to the provisions of O 92 r 4, it is hereby ordered that the proceedings in respect of Civil Suit No 22–28 of 2003 are to be stayed until the proceedings in respect of Civil Suit No 21–9 of 2002 is adjudicated upon and determined.

[6] It is the considered view of this court that it is obvious from the said passages of the said judgment that the outcome of the proceedings in Civil Suit No 21–9 of 2002 ('the first civil suit') has an important and direct bearing to this Civil Suit No 22–28 of 2003 ('this civil suit'). This court finds that the findings and observation of Her Ladyship in the said judgment has a direct bearing to consider whether this civil suit should be allowed to proceed and the plaintiff relitigate the same subject matter of this civil suit which is similar to the first civil suit and which has been adjudicated upon and determined. Nevertheless, and in fairness to the plaintiff, Her Ladyship,

in exercise of the court's discretion under O 92 r 4 of the Rules of the High Court 1980 had ordered the proceedings in this civil suit to be stayed until the proceedings in the first civil suit is adjudicated upon and determined.

[7] For the purpose of completion, it is important to briefly state what is encl 49 referred to in the judgment of Her Ladyship. Enclosure 49 is an application filed on behalf of the defendant seeking the leave of the court to determine questions pursuant to O 14A of the Rules of the High Court 1980, inter alia, and in particular, for the purpose of this application (encl 103) is as follows:

> Adakah plaintif menyalahgunakan proses Mahkamah dengan membawa tindakan ini walaupun satu tindakan yang sama telah dimulakan oleh plaintif di Mahkamah Tinggi Malaya di Kuantan melalui Guaman Sivil No 21-9-02 terhadap:
>
> (a) Kerajaan Negeri Pahang Darul Makmur
>
> (b) Pengarah Perhutanan Negeri Pahang Darul Makmur ('the first civil suit').

[8] In addition to the said judgment dated 10 February 2004 (exh A), there is also the grounds of judgment dated 25 February 2007 of His Lordship, Hj Abd Halim bin Aman J (exh B) in the first civil suit which was decided after a full trial. Based on the evidence both oral and documentary produced at the trial in the first civil suit which was against the State Government of Pahang and State Director of the Forestry Department Pahang, the court awarded damages in the sum of RM37,127,471.60 with interest and costs. It is to be noted from the grounds of judgment dated 25 February 2007 in the first civil suit (exh B), the plaintiff in this civil suit who is also the plaintiff in the first civil suit had called a witness Hj Abdullah bin Hj Rahman (PW5), the secretary of UMNO Pahang (Setiausaha Kerja UMNO Pahang) in connection with the same area of the land, being the subject matter in both the civil suits, which land is owned by UMNO and this fact is not disputed. In addition, this court also finds that:

(a) the subject matter of both the civil suits, being the area, location and the details of the land in question is the same; and

(b) the particulars of the alleged loss and damages as pleaded in the statement of claim in paras 6 and 7 of the statement of claim in this civil suit and in paras 8 and 9 of the said amended statement of claim in the first civil suit are same and identical.

(i) *By paras 8 and 9 of the amended statement of claim in the first civil suit*, the plaintiff has pleaded as follows:

> 8 Akibat dari kecuaian defendan kedua plaintif telah mengalami kerugian yang dianggarkan berjumlah ~~RM36,339,030.00~~. RM31,160,295.00.

Butir-butir Kerugian

(i)	Kehilangan kayu balak pelbagai jenis akibat pencerobohan oleh pihak-pihak ketiga (Lesen KT2/2001(KP) dan KT49/2001(KP)-10,873 tan	
(ii)	Kehilangan kayu balak pelbagai jenis akibat pencerobohan oleh pihak-pihak ketiga (Lesen KT 52/99, KT 9/2000, KT 57/99, KT 36/99 dan KT 6/99)	-66,066 tan
(iii)	Kehilangan kayu balak pelbagai jenis bakal diperolehi daripada kawasan 930 hektar (2300 ekar) yang tidak dibenarkan pengeluaran kayu balak	-66,066 tan
		76,939 tan
		89,726 tan

Nilai Kerugian

76,939

89,726 tan x RM405.00 setan (iaitu keuntungan bersih) =

RM31,160,295.00

RM36,339,030.00

9 Plaintif telah menuntut daripada defendan kedua supaya plaintif dipampaskan untuk kerugian tersebut tetapi defendan kedua masih tidak menjelaskan tuntutan plaintif.

DAN plaintif menuntut:-

(a) gantirugi am;

(b) faedah;

(c) kos;

(d) lain-lain perintah yang suaimanfaat.

(ii) *By paras 6 and 7 of the statement of claim in this civil suit*, the plaintiff has pleaded as follows:

6 Akibat dari keingkaran perjanjian di pihak defendan plaintif telah mengalami kerugian dianggarkan berjumlah RM31,160,295.00.

Butir-butir Kerugian

(i)	Kehilangan kayu balak pelbagai jenis akibat pencerobohan oleh pihak-pihak lain (Lesen KT2/2001(KP) dan KT49/2001(KP)	-10,873 tan
(ii)	Kehilangan kayu balak pelbagai jenis bakal Diperolehi daripada kawasan 930 hektar (2300 ekar) yang tidak dibenarkan lesen bagi pengeluaran kayu balak	-66,066 tan
		76,939 tan

Nilai Kerugian

76939 tan x RM405.00 setan (iaitu keuntungan bersih) = RM36,160,295.00.

7 Plaintif telah menuntut pampasan daripada defendan tetapi defendan enggan membuat sebrang bayaran.

DAN plaintif menuntut:-

(e) gantirugi am;

(f) faedah;

(g) kos;

(h) lain-lain perintah yang suaimanfaat.

In fact *by para 4 of the statement of claim in the first civil suit*, the plaintiff has pleaded that the said land (being the subject matter of both the civil suits) is owned by UMNO and particulars of the said land is pleaded in para 3 of this civil suit. *By para 3 of the statement of claim in this civil suit*, the plaintiff has referred to an agreement dated 2 October 2000 entered into between the plaintiff on the one part and the defendant on the other part and executed and signed by the person in the name of Tn Hj Abdullah bin Hj Rahman purported to act on behalf of the defendant which in fact is in respect of the same land which has been adjudicated upon and determined in the first civil suit on 25 February 2007 by the High Court Kuantan.

RES JUDICATA

[9] In civil cases, a previous judgment or order is relevant when it is tendered in evidence in support of a plea of res judicata and which was a fact in issue see *Ram Ranjan Chakerbati v Ram Narain Singh* 22 C 533; 22 IA 60 (PC); *Dinomoni v Brojo Mohini* 29 C 187; 29 IA 24 (PC)). It is in the interest of the public at large that there should be an end to litigation (*interest ripublicae ut sit finis litium*). In other words there should be finality to the binding decisions pronounced by courts of competent jurisdiction.

> It is equally settled law that in order for the doctrine of res judicata, cause of action or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decision (see *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 at p 123; *Government of Malaysia v Dato' Chong Kok Lim* [1993] 2 MLJ 74).

[10] On the facts and circumstances in this instant case, it would be an affront to justice to permit the plaintiff to relitigate their cause for the same relief and based on the same subject matter for which the plaintiff's have successfully obtained a judgment after a full trial. This court wishes to stress that although the cause of action in this civil suit is for breach of contract of the said agreement dated 2 October 2000 and the cause of action in the first civil suit is for negligence, the fact remains and admittedly, the relief claimed is the same and in respect of the same subject matter and consequent to the same agreement dated 2 October 2000. Therefore, it would be most unjust to permit the plaintiff to make a double claim arising out of the same transaction and this would amount to abusing the process of the court, frivolous and scandalous as the claim of relief is wholly unnecessary. In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783:

> The word 'scandalous' means wholly unnecessary or irrelevant. Frivolous or vexatious means, where it is obviously unsustainable, eg where the petition is res judicata or without merit and unjustified (see *Boey Oi Leng (trading as Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566).

[11] However, the plaintiff must be aware that the person who has the capacity to execute the agreement on behalf of the defendant is not Tn Hj Abdullah bin Hj Rahman who had executed the said agreement with the plaintiff. According to para 6.1(iv) of the affidavit on behalf of the defendant (encl 103A), there must be at least three of the office bearers of the defendant who are authorised to execute the said agreement and this is also confirmed by the resolution of the committee of the defendant. However, it is regrettable there is no rebuttal evidence or evidence to the contrary on behalf of the plaintiff to para 6.1(iv) of the defendant's affidavit in support (encl 103A) that Tn Hj Abdullah bin Hj Rahman has no authority under the

Constitution of the defendant to execute the said agreement which is the basis of this civil suit and has reference to the Constitution of the defendant and of the Societies Act 1966.

[12] This court is mindful of the fact that the cause of action in the first civil suit was for negligence and that it was against the State Government of Pahang and the State Director of the Forestry Department, Pahang who were named as the defendants. Whereas the cause of action in this civil suit is for breach of contract and is against Badan Perhubungan UMNO Negeri Pahang Darul Makmur. Nevertheless, this court is of the considered view that on the facts, background and the circumstances and taking into the account the relevant documents exhibited to the defendant's affidavit in support (encl 103A), the plaintiff cannot divide their case into separate compartments and proceed by way of installments in order to suit their own convenience where the relief applied in this civil suit admittedly has been included and claimed in the first civil suit where judgment had already been granted in favour of the plaintiff. This court is of the considered view that the cause of action in both the civil suits are interrelated and intertwined as part and parcel of the same one and only transaction and the plaintiff cannot be permitted to make double claim by filing two separate actions for the same relief. In fact, the basis of the plaintiff's claim in the first civil suit has the similarity to the plaintiff's claim in this civil suit which is based on an agreement dated 2 October 2000 entered into between the plaintiff and a person Tn Hj Abdullah bin Hj Rahman purported to act on behalf of the defendant. It was pursuant to the said agreement that the claim in both the civil suits were filed as without the said agreement dated 2 October 2000, there could have been no link to implicate the defendant's named in both the civil suits. This finding by this court is made solely and only for the purpose of deciding this application (encl 103) and the application of the doctrine of res judicata and is not to be construed as having had decided the merits of the plaintiff's claim.

[13] There is another important matter which ought to be given due consideration for the purpose of deciding this application and which has been overlooked by both parties. On going through the file in this civil suit, this court found that the grounds raised in the affidavit on behalf of the plaintiff and affirmed on 3 November 2003 by one Loo Thin Yang, a director of the plaintiff company (encl 62A) in support of summons in chambers dated 6 November 2003 (encl 62) which is an application by the plaintiff to consolidate this civil suit with the first civil suit has an important and decisive consideration to this application (encl 103). The grounds raised by the plaintiff themselves in the said application (encl 62) and having been admitted by paras 5, 6, and 7 of the said affidavit (encl 62A), are as follows:

(1) Isu-isu perundangan dan fakta-fakta yang sama berbangkit dari kedua-dua tindakan; **A**

(2) Hak-hak dan relief-relief yang dituntut oleh plaintif adalah berbangkit dari transaksi-transaksi atau turutan transaksi yang sama;

(3) Saksi-saksi yang dipanggil dan dokumen-dokumen yang akan dirujuk adalah sama; **B**

(4) Masa dan kos dapat dijimatkan sekiranya tindakan-tindakan tersebut disatukan dan dibicarakan serentak.

By para 5 of the said affidavit (encl 62A), the plaintiff through the said Loo Thin Yong has stated: **C**

(5) Saya sesungguhnya dinasihatkan dan mengatakan bahawa kedua-kedua tindakan Guaman No: MT(1)–22–28–2003 dan MT(2)–21–09–2002 perlu disatukan dan dibicarakan serentak atas alasan-alasan berikut bahawa: **D**

(a) Beberapa soalan undang-undang atau fakta yang sama berbangkit dalam kedua-dua atau kesemua kausa atau perkara itu terutamanya Perjanjian yang bertarikh 02-10-2000 dan efek-efeknya serta syarat-syarat yang termaktub; (Salinan Perjanjian yang bertarikh 02-10-2000 dilampirkan dan ditandakan sebagai Ekshibit 'A–3') **E**

(b) Hak untuk mendapatkan relief yang dituntut didalamnya adalah berkenaan dengan atau berbangkit daripada transaksi atau siri transaksi yang sama' (Sesalinan surat yang bertarikh 28-02-2000; surat yang bertarikh 31-07-2000 dan 31-03-1998 ditandakan sebagai Ekshibit 'A–4', 'A–6' masing-masing). **F**

(6) Kami sesungguhnya juga dinasihatkan bahawa saksi-saksi yang akan dipanggil untuk memberikan keterangan dan dokumen-dokumen yang akan dikemukakan dalam perbicaraan kelak adalah sama dalam kedua-dua tindakan tersebut.

(7) Justeru itu, masa Mahkamah Yang Mulia ini dan tempoh perbicaraan serta wang dapat dijimatkan oleh semua pihak yang berkenaan termasuk saksi-saksi yang akan dipanggil kelak. **G**

[14] In all fairness to both parties and in keeping with the spirit and object of the adversarial legal system in this jurisdiction, this court had invited both parties to submit on the said affidavit (encl 62A) which was affirmed on 3 November 2003 on behalf of the plaintiff (see *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293 at p 302): **H**

(a) *Learned counsel for the plaintiff* having had gone through the said affidavit (encl 62A) has conceded to the following which was raised on behalf of the plaintiff in the said affidavit: **I**

(1) Saya sesungguhnya dinasihatkan dan mengatakan bahawa kedua-dua

tidakan Guaman No: MT(1) 22-28-2003 dan MT(2) 21-09-2002 perlu disatukan dan dibicarakan serentak atas alasan-alasan berikut bahawa:

(2) Beberapa soalan undang-undang atau fakta yang sama berbangkit dalam kedua-dua atau kesemua kausa atau perkara itu terutamanya Perjanjian yang bertarikh 02-10-2000 dan efek-efeknya serta syarat-syarat yang termaktub; (Sesalinan Perjanijan yang bertarikh 02-10-2000 dilampirkan dan ditandakan sebagai Ekshibit 'A-3')

(3) Hak untuk mendapatkan relief yang dituntut di dalamnya adalah berkenaan dengan atau berbangkit daripada transaksi atau siri transaksi yang sama; (Sesalinan surat yang bertarikh 28-02-2000; surat yang bertarikh 31-07-2000 dan 31-03-1998 ditandakan sebagai Ekshibit 'A-4', 'A-5' dan 'A-6' masing-masing.)

(4) Kami sesungguhnya juga dinasihatkan bahawa saksi-saksi yang akan dipanggil untuk memberikan keterangan dan dokumen-dokumen yang akan dikemukakan dalam perbicaraan kelak adalah sama dalam kedua-dua tidakan tersebut.

(5) Justeru itu, masa Mahkamah Yang Mulia ini dan tempoh perbicaraan serta wang dapat dijimatkan oleh semua pihak yang berkenaan termasuk saksi-saksi yang akan dipanggil kelak.

(b) *Learned counsel for the defendant* had submitted that the affidavit of the plaintiff (encl 62A) had further strengthened the contention of the defendant that the facts, transaction, the background and the reliefs claimed in this civil suit are similar as in the first civil suit where the court had already adjudicated upon and determined the claim.

[15] However, it must be noted that on 31 July 2005, the plaintiff had applied to withdraw the said summons in chambers (encl 62). Nevertheless, this court is unable to find any order that has been made by the court on the application of the plaintiff's counsel to withdraw the said summons in chambers (encl 62). In any event, this court is of the considered view that notwithstanding that there was an application to withdraw the summons in chambers (encl 62), the affidavit evidence (encl 62A) which was affirmed on behalf of the plaintiff is still admissible and the affidavit evidence has not been withdrawn, struck out or expunged from the records of the court file. Accordingly, the affidavit evidence is admissible and can be applied to determine this application (encl 103) unless the evidence has been expressly ordered by the court to be expunged where this court is unable to find such an order. In any event, it is clear by the plaintiff's own admission that, *first*, the same facts are raised in both the civil suits and the cause of action is based on the terms and conditions as contained in the said agreement to the relief claimed in both the civil suits is in respect of the same transactions or series of the same transaction. *Secondly*, the witnesses who have been called in the first civil suit and this civil suit and the document be produced are the same.

[16] It is the considered view of this court that this civil suit is in the strictest sense of the words vexatious and an abuse of the process of the court and an appropriate case to invoke the inherent jurisdiction of the court to prevent any relitigation of the same subject matter and applying the wider sense of res judicata.

In *Green v Weatherill* [1929] 2 Ch 213, Maugham J said that:

> … the plea of res judicata is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end of litigation.

In *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54 Megarry VC observed:

> … especially if the second proceedings have the same result as the first; but the drastic step of striking out the proceedings is quite another matter.

In *Re May* (1885) 28 Ch D 516 at p 518, Brett MR said:

> … it is one of the most fundamental doctrines of all courts, that there must be an end to all litigation.

In *Kwa Ban Cheong v Kuah Boon Seck & Ors [2003] SGHC 132* [2003] 3 SLR 644, Belinda Ann J said:

> The power is to be exercised with caution before striking out or dismissing any proceedings on the ground of abuse of process of the court. This is a drastic step as it will deprive a litigant of the opportunity to have either his claim or defence tried by the court: *North West Water Ltd v Binnie ua Partners (a firm)* [1990] 3 All ER 547 at p 553. The onus of proving an abuse of process lies firmly on the party alleging it: Lord Millett in *Johnson v Gore* at p 118; Sir David Cairns in *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 at p 138. The court can, in a proper case, find abuse of process by an attempt to relitigate an issue which has for real or practical purposes been decided in earlier proceedings. In *Nanang International Sdn Bhd v The China Press Bhd* [1999] 2 MLJ 681, the plaintiff sued the defendants for defamation in respect of an article published by the defendants. The plaintiff's earlier suit against three different defendants involving the same defamatory article was dismissed. Whilst the defendants in the two suits were different, the plaintiff was relying on the same evidence as the basis of its complaint. Kamalanathan Ratnam J pointed out that irrespective of whether the second action involved different parties, the doctrine of issue estoppel has been given a wider construction and extended to preclude a party to an earlier action from relitigating in a second action with identical issues of fact, law or mixed fact or law which have been determined against him in the earlier action. He accepted the reasoning of Drake J in *North West Water* who held that where an issue had for all practical purposes been decided in a court of competent jurisdiction, it would be an abuse of process to allow the issue arising out of identical facts and on the same evidence to be relitigated in separate proceedings between different parties.

In *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck and another [2006] SGHC 124* [2006] 3 SLR 712, Andrew Ang J said:

> In *Spencer Bower, Turner and Handley, The Doctrine of Res Judicata (Butterworths, 3rd Ed, 1996) ('Spencer Bower')*, it is stated at para 19 as follows:
>
> A party setting up res judicata by way of estoppel as a bar to this opponent's claim, or as the foundation of his own, must establish the constituent elements, namely:
>
> (a) The decision was judicial in the relevant sense;
>
> (b) It was in fact pronounced;
>
> (c) The tribunal had jurisdiction over the parties and the subject matter:
>
> (d) The decision was:
>
> (i) Final, and
>
> (ii) on the merits;
>
> (e) It determined the same question as raised in the later litigation; and
>
> (f) The parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem.
>
> The passage quoted above was cited with approval in a number of cases including *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 at p 607.

The final requirement is that there must be an identity of subject matter in the two proceedings. The correct approach to identify the issue is to ask what had been litigated and, secondly, what had been decided. In the case of issue estoppel, the decision on the issue must have been a 'necessary step' to the decision or a 'matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision' (see *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853 at p 965 per Lord Wilberforce quoting from *R v The Inhabitants of the Township of Hartinghton Middle Quarter* [1855] 4 E1 & B1 780 at p 794; 119 ER 288 at p 293.

Diplock LJ (as he then was) defined issue estoppel thus in *Thoday v Thoday* [1964] P 181 at p 198:

> 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his causes of action; and there may be cases where the fulfillment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfillment of the identical condition, assert that the condition was fulfilled if the

court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.

In the passage referred to in *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853 at p 947, Lord Upjohn had said:

All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

In *Lam Chun Lin v Lee Wai Chao & Ors* [1998] 2 HKC 68, Cheung J said at p 70:

The argument is attractive but the fundamental question is: on what basis can the plaintiff be estopped, in her claim against the third defendant, from alleging that the driver was in fact not he second defendant but rather the first defendant. Mr Chong could cite no authority. It would appear that the only possible basis is that of res judicata. It is necessary to remind oneself how the doctrine of issue estoppel by res judicata would arise. Lord Guest in *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853 at p 935A stated that The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The nature of a judgment in default is discussed at n13/1/6 of the *Supreme Court Practice 1997* Vol 1: 'By making default in giving notice of intention to defend, the defendant admits all the allegations in the statement of claim endorsed on the writ' (*Cribb v Freyberger* [1919] WN 22).

In *Chan Tuck Seng v Chan Lee @ Chan Kong Chai & Ors* [2004] 3 MLJ 62 at p 75 Abdul Malik Ishak J (now JCA) said at p 75:

It is germane to mention that the doctrine of estoppel *per rem judicatem* is sometimes referred to as estoppel by record inter parties. A judgment is said to be conclusive as to the facts on which it was based as against the parties to the legal proceedings in which the judgment was given and their privies. The word 'privies' would refer to those persons who derive title from an original party or who share with such a party a common interest in the subject matter of the litigation in question. On this point, it is ideal to read the case of *Mercantile Investment and General Trust Company v River Plate Trust, Loan and Agency Company* [1894] 1 Ch 578. The literature on estoppel by record may go on *ad infinitum*.

[17] As to the issue whether estoppel can apply in a subsequent action by the same plaintiff where the defendant was not a party in the first civil action, this court is of the considered view that the doctrine of issue of estoppel is available to a non-party. (see *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581; *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54;

Teguh Consolidated Sdn Bhd v Talam Corp Bhd (Malayan Banking Bhd, Third Party) [1996] 5 MLJ 664) (see also *Leong Yew Chin v Hock Hua Bank Bhd* [2008] 3 MLJ 340; *Kluang Wood Products Sdn Bhd & Anor Hong Leong Finance Bhd & Anor* [1994] 4 CLJ 141 at p 154; *Gregson v Erangelon* [2003] EWHK 332 (QB); *Stephenson v Garnett* [1898] 1 QB 677 at pp 680–681, 682; *Greenhalgh v Mallard* [1947] 2 All ER 255; *Montgomery v Russell* [1894] 1 TLR 112; *Henderson v Henderson* [1843–60] All ER Rep 378).

The requirement of *issue estoppel* are:

(a) The same question has been decided.

(b) The judicial decision which is said to create the estoppel was final.

(c) The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies (see Lord Guest in *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853 at p 935; *Henderson v Henderson* (1843) 67 ER 313; *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346).

[18] Be that as it may, the fact that the defendant in this civil suit is not the same defendant as in the first civil suit does not disentitled the defendant in this civil suit to apply to invoke the doctrine of issue estoppel as the defendant in both the civil suits need not necessarily be the same and each case is decided on its own set of facts and circumstances. The fact that the defendant in both the civil suits are not the same party is not necessarily fatal to this application in order to invoke the doctrine of issue estoppel as the parties in this civil suit named as the defendant, need not necessarily be the same party or parties (see *North West Water Ltd v Binnie ua Partners (a firm)* [1990] 3 All ER 547 followed in *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713 at pp 721–725, 729; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581; *Boey Oi Leng (trading as Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566). In any event and admittedly, there is a privity of interest between the defendant in both the civil suits filed by the plaintiff to successfully invoke the doctrine of res judicata.

[19] As stated above, the facts, background and circumstances of both the civil suits are so interrelated and intertwined that the plaintiff cannot divide their claim into two separate segments and have their day in court according to their whims and fancies. Consequently, the plaintiff is not permitted to abuse the process of the court by attempting to make double claim, particularly, when the plaintiff had already obtained judgment in the first civil suit for damages in the sum of RM37,127,471.60 with interest and costs which is the same relief the plaintiff has claimed in this civil suit. The process or machinery of the court should not be used improperly or abused. Any two

sets of proceedings in respect of the same subject matter and the same relief claimed would be unnecessary and is an abuse of the process of the court. There must be some sense of finality to a judicial process and that the finality in litigation should be arrived at the minimum expense to the parties and in order to bring a speedy disposal. Having said that, this court is mindful that each case is to be considered on its own set of facts, background and circumstances and it is not an absolute rule as there may be exceptions to this rule. Nevertheless, the facts, background and circumstances in this civil suit justifies the same to be struck out and does not fall under any exception but is in fact is an abuse of the process of the court and would lead to an unjust result.

In *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 the Court of Appeal said at p 384:

> *The terms abuse of the process of the court* in O 18 r 19(1)(d), *has been given a wide interpretation by the courts*. It includes consideration of public policy and the interest of justice. *This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery it will prevent the judicial process from be used as a means of vexation and oppression in the process of litigation*. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose, as was raised by the respondents in *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489, Stuart Smith LJ stated that, if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court (see *Boo Are Ngor (P) v Chua Mee Liang (P)* [2009] 6 MLJ 145 at p 151).

In *Goh Koon Suan v Heng Gek Kiau & Ors* [1991] 2 MLJ 307 Yong Pung How CJ said at p 311:

> A *proceeding is said to be vexatious when the party bringing it is not acting bona fide, and merely wishes to annoy or embarrass his opponent or when it is not calculated to lead to any practical result*: *Fowitt's Dictionary of English Law*. *Abuse of the process of the court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive*: *Words & Phrases judicially Defined*. The plaintiff's action against the second to fifth defendant was clearly unsustainable, and the plaintiff could not possibly hope to achieve any practical result. Neither was the action instituted in good faith as the plaintiffs solicitors must have known that the second to fifth defendant had no choice but to hand over the 10% deposit of $28,000 and the cashier's orders to the client, the first defendant. In my opinion, the plaintiff's action in joining the second to fifth defendant was meant to embarrass them, and that being so, and order to strike out under O 18 r 19 was properly made, to obviate the need for a full trial I would therefore dismiss the appeal with costs.

[20] As for the doctrine of res judicata or issue of estoppel, this court would not be able to set out an exhaustive list of relevant factors for the court to exercise its inherent jurisdiction in order to decide whether the process of the court is being abused or where the doctrine of res judicata or estoppel is invoked. This court would ensure that the jurisdiction of the court to strike out the action will only be activated where an injustice is caused, to prevent an abuse, to prevent the dignity of the court being misused so as to facilitate the administration of justice.

In *Packirisamy v Janagi* [1970] 2 MLJ 202, Sharma J said at p 203:

> In exercising their discretion it is the duty of the courts to exercise that discretion judicially, that is in accordance with commonsense and doing so should bear in mind all that may promote justice and not defeat it. If discretion is exercised otherwise, it may only tend to strike at the root of justice or result in injustice being done.

In *Maxwell v Keun & Ors; Same v Same* [1928] 1 KB 645 Atkin LJ said:

> … in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only be properly done to the other party by coming to that conclusion.

In *Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1996] 4 MLJ 233, Vincent Ng J (as he then was) said at pp 246–247:

> It is appropriate to note that there is a distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.
>
> In *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853, the following requirements of issue estoppel were laid down; (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> One of the purpose of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the *Carl Zeiss*' case [1967] 1 AC at p 947.
>
> To create an estoppel by record, the finding must be part of the ratio decidendi (see *Sanders (orse Saunders) v Sanders (orse Saunders)* [1952] 2 All ER 767). Equally an estoppel per rem judicata can only be based on the issues actually decided in the

former proceedings and not on what are called 'collateral issues' (see *Carl Zeiss Stiftung v Rayner & Keeler Ltd) (No 3)* [1970] 1 Ch 506 and it should be specifically pleaded but it may be pleaded by way of estoppel to an entire cause of action rather to a single matter in issue (see 16 *Halsbury's Laws of England* (4th Ed) para 1527).

To raise res judicata a defendant has to produce the pleadings and record of proceedings and judgment. The party replying on res judicata giving rise to an estoppel should be able to show that the matter had been determined by a judgment in its nature final (see *Turley v Dew* (1906) 94 LT 216; *Bynoe v Bank of England* [1902] 1 KB 467; *Land v Land* [1949] 2 All ER 218). The word 'final' is used here as opposed to 'interlocotury' (see *Allnutt v Mills* (1925) 42 TLR 68) and the record of the court's act on which the estoppel by res judicata is founded must be forthcoming, or some valid reason given why it cannot be produced' (see *The Annie Johnson; Kok Ken Seng v Siti Zaliha bt Mohd Nor & Anor* [1993] 1 AMR 74 at p 77).

[21] On the facts, background and the circumstances in this case, and the fact that there is no rebuttal evidence by an affidavit in reply to all the facts alluded by the defendant in the affidavit in support (encl 103A), this court finds that it would be unjust to bring the defendant to court or to allow the plaintiff to relitigate and produce, as admittedly, the same set of facts, the same witnesses and the same set of documents, apart from the said agreement dated 20 October 2000 as *first*, the plaintiff had already obtained judgment for damages which is the same relief which the plaintiff has claimed in this civil suit and in respect of the same subject matter, *secondly*, if the plaintiff has a bona fide claim against the defendant named in this suit, the same could have been included in the first civil suit as the facts as admitted by the plaintiff in both the civil suits are the same and the witnesses are same except for a fact that the cause of action which is different in the first civil suit which was being for negligence and the cause of action in this civil suit, is for breach of contract. Nevertheless, the fact remains and is not denied that the claim and relief in this civil suit is the same as the claim and relief in the first civil suit which has been adjudicated upon and determined by the High Court, Kuantan (see *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals* [2003] 4 MLJ 654 (CA). In fact, this court also finds that the submission raised on behalf of the plaintiff is shown to be inconsistent with their conduct and when compared with the documents and other compelling evidence which is self-contradictory with the plaintiff's own evidence as found in the said affidavit (encl 62A). It is not correct and misplaced to contend that the order for stay granted by Her Ladyship Heliliah bt Mohd Yusof J (now FCJ) in respect of this civil suit is still in force as the first civil suit has been heard, adjudicated upon and determined upon and determined by His Lordship Abdul Halim bin Aman J on 25 February 2007 unless that judgment in the first civil suit has been set aside or successfully impugned.

[22] The doctrine of res judicata has been explained in detail in *Asia Commercial Finace (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at pp 197–202 and under what circumstances or facts, the doctrine shall apply:

> What is judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgement becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro* in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenged the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have been given birth to the controversies alluded above; the corolarry being that neither of such parties be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawlor v Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel … prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.
>
> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel *per rem judicatum*.
>
> We are of the opinion that the aforesaid contrary view is to be preferred; it represents one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.
>
> It is further necessary at this stage to understand the import of the words in the said famous statement, ie '… every point which properly belonged to the subject of litigation …' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:
>
> > … res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

The explanation of Somervell LJ was also quoted with approval in the Privy Council in *Yat Tung Investment Co v Dae Heng Bank & Anor* [1975] AC 581; [1975] 2 WLR 690 (see also the majority decision in *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613 at pp 622–626, [1998] 2 CLJ 440 at pp 451–456).

[23] In the circumstances and having considered the established principles in a striking out application of the pleadings or the claim of the plaintiff, in particular, the decision in *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 this court is of the considered view that this is an appropriate case for invoking the powers of the court to strike out the plaintiff's claim. Justice and fair play between the parties must present an underlining principle of the extended doctrine of res judicata. While in seeking to prevent abuse of its process, the court is to exercise a form of discipline over the parties (see *Ulser Bank Ltd v Fisher & Fisher* [1999] N1 68 (Ch D); *C (a minor) v Hacknery London Borough Council* [1996] 1 FLR 427; [1996] 1 All ER 973; [1996] 1 WLR 789 (CA); *Hebei Import & Export Corp v Polytek Engineering Co Ltd (No 2)* [1998] 1 HKC 192; *Ooi Bee Tat @ Ooi Bee Lee v Ooi Bee Tat & Sons Sdn Bhd & Anor* [1999] 5 MLJ 10). The court finds that the reliefs or prayers in this suit is substantially the same as in the first civil suit. In any event, if there are two suits with substantially the same question or issue, it is only just and proper that the issue should be determined in only one of the suits.

The following legal principles enunciated in *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 is applied in the context of a striking out application:

(a) The court will only strike out pleadings in 'plain and obvious cases'.

(b) The striking-out procedure can only be adopted 'when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

(c) The court cannot exercise 'a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence'.

(d) At the striking-out stage, the court is not concerned with the respective merits of the claims.

(e) Lastly, so long as the pleadings 'disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out'.

In *Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16; [1993] 3 CLJ 606, wherein His Lordship Peh Swee Chin SCJ, inter alia, stated as follows:

A We must emphasise that for any court to reach such a similar decision on an application under O 18 r 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

B In *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347; [1985] 1 CLJ 235; [1985] CLJ (Rep) 45, Seah FJ said:

In our judgment, this is not a proper time to consider these rival submissions when the inherent jurisdiction of the court is invoked to strike out a writ and/or
C statement of claim on the ground that it was an abuse of the process of the court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution (see *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1).

D **[24]** The power to strike out any pleadings under O 18 r 19 of the Rules of the High Court 1980 is not mandatory but permissive and confers a discretionary jurisdiction to the court to be exercised having regard to the quality and all the circumstances relating to the offending plea (see *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade*
E *Unions & Ors* [1990] 3 MLJ 231; [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218).

In *Lee Nyan Choi v Voon Noon* [1979] 2 MLJ 28; [1978] 1 LNS 94, Lee Hun Hoe CJ (Borneo) said:

F The power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases.

In *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai*
G *Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd & Ors* [1996] 1 MLJ 309; [1996] 1 CLJ 257, Siti Norma Yaakob JCA (as Her Ladyship then was) said:

The discretionary power to dismiss an action summarily under O 18 r 19 and
H under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim (see *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1). Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the
I case has no chance of success (see *McKay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 WLR 890).

In *Goodson v Grierson* [1908] 1 KB 761, Fletcher Moulton LJ observed:

> … But it is a serious thing to dismiss an action before it has been tried, and a clear case for doing so must be made out.

In *Tsang Chin Keung v Employees Compensation Assistant Fund Board (No 2)* [2003] 1 HKC 499, Hong Kong Court of Appeal said:

> The jurisdiction of the court is to prevent the continuation of civil proceedings on the grounds of abuse of process must be exercised with extreme caution. It is a very serious matter to prevent a party from commencing litigation or pursuing it. That can only be done in circumstances where the court considers that it is, in the words of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at p 536, the court's duty rather than a discretion exercised by the court. It is, as the judge said at p 536C:
>
> > … The inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly.

There are, perhaps, at least two steams of thought which have led to the recognition of this duty on the part of the court. The first is the general abuse which would come from raising the same issues in a subsequent proceedings simply by changing the form of the action. This was recognised for example by Lord Halsbury LC in *Reichel v Magrath* (1889) 14 App Cas 665 at p 668. The recognition stemmed, perhaps, from a need to have finality and certainty in the outcome of litigation. Akin to that have been the various attempts to demonstrate that a conviction has been wrongful by bringing ancillary litigation, whether it be against police officers, lawyers or otherwise, the effect of which is to demonstrate the wrongfulness of the conviction. The other aspect is one of unfairness to a party who is entitled to rely on a previous decision and is put to disadvantage by having to contest the new litigation.

In *Woon Tek Seng & Another v V Jayaraman a/l VA Vellasamy and another [2008] SGHC 38* [2008] 3 SLR 43, Chan Seng Onn J said:

> In *Tan Kim Seng v Ibrahim Victor Adam* [2004] 1 SLR 181 the Court of Appeal said at pp 184–185 that:
>
> > In the course of the last decade, there has been a major shift in the judicial approach towards the control of litigation proceedings, not only in Singapore, but in other parts of the Commonwealth. The emphasis is now on expedition, economy, and the avoidance of delay in litigation. Disputes will no longer be allowed to drag on for years.

Belinda Ang Saw Ean J in *Kwa Ban Cheong v Kuah Boon Seck & Ors [2003] SGHC 132* [2003] 3 SLR 644 ('*Kwa Ban Cheong*') said at paras [25] and [27] that:

A [25]... What is required to ascertain whether an action is an abuse of process is a broad, merits-based judgment which takes account of private and public interests and all the facts of the case.

[27]... Given the nature of the rule, it would be unwise to try and define fully the circumstances which can be regarded as an abuse. Each case must depend upon all the relevant circumstances.

B

The jurisdiction to strike out a statement of claim, whether under the Rules or under the inherent jurisdiction of the court, is only exercised in a plain and obvious case: see *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR 517 at [12] of the decision of the Court of Appeal.

C

It is trite law that the court's power to strike out an action is a draconian one, and should not be exercised too readily unless the court is convinced that the plaintiff's case is wholly devoid of merit: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1988] 1 SLR 374. The Court of Appeal explained at [22] that:

D

> The term, 'abuse of the process of the court', in O 18 r 19(1)(d), has been given a wide interpretation by the courts. It includes consideration of justice. This term signifies that process of the court must be used bona fide and properly and must not be abuse.

E

> The court will prevent the improper use of the machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or and abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose, as was raised by the respondents. In *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489, Stuart-Smith LJ stated that, if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be stuck out as an abuse of the process of the court.

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G In *Kwa Ban Cheong* ([34] si(ra) at [29], Ang J said:

> The power is to be exercised with caution before striking out or dismissing any proceedings on the ground of abuse of process of the court. This is a drastic step as it will deprive a litigant of the opportunity to have either his claim or defence tried by the court: *North West Water Ltd v Binnie ua Partners (a firm)* [1990] 3 All ER 547 at p 553. The onus of proving an abuse of process lies firmly on the party alleging it: Lord Millet in *Johnson v Gore* at p 118; Sir David Cains in *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 at p 138.

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[25] Although the party sued in this civil suit is not the same party as in the first civil suit the issues raised and the reliefs sought in both the civil suits are similar. Accordingly, this court is of the considered view that the substantial duplication of issues and reliefs sought in both the civil suits amounts to

multiplicity of actions. In the circumstances, this court finds that this civil suit is in fact vexatious, frivolous, scandalous and is an abuse of the process of the court and ought to be struck out having regard to the justice of the case. It is important to be reminded that the doors of justice are open to litigants who have a legitimate or genuine cause of action against his or her adversary and should not be permitted to abuse the entry granted to this sacred institution.

[26] In conclusion, this court finds that after having taken all the factors together which has a cumulative effect, the defendants have satisfied this court that this is an appropriate case in which justice requires that res judicata, in particular, issue estoppel should be invoked against the plaintiff. Accordingly, to allow the plaintiff to proceed on with this civil suit would be an abuse of the process of the court.

[27] In the circumstances, and in accordance with the rules of reason and justice, this application (encl 103), is allowed namely, prayers (a) and (b) and the writ of summons (encl 2) is struck out.

The defendant are allowed costs of this application.

Defendant's application allowed and plaintiff's writ of summons struck out with costs.

Reported by M Sivabarathi